IN THE

Supreme Court of the United States

AUG 29 1973

October Term, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

RESPONDENTS' BRIEF AND SUPPLEMENTAL APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DEVEREUX MILBURN
2 Wall Street
New York, New York 10005
Attorney for Respondents Carlisle & Jacquelin and DeCoppet & Doremus

WILLIAM ELDRED JACKSON
RUSSELL E. BROOKS
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for Respondent New York Stock Exchange, Inc.

Of Counsel:
CARTER, LEDYARD & MILBURN
MILBANK, TWEED, HADLEY & MCCLOY

August 29, 1973

TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX

TABLE OF AUTHORITIES

PAGE

Constitution, Statutes and Rules:

Miscellaneous:

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Questions Presented

1. Did Rule 23, Federal Rules of Civil Procedure, as amended in 1966, change the substantive law to permit a "fluid recovery" of money damages to be awarded under the antitrust laws and Securities Exchange Act of 1934 to a "class as a whole" of future purchasers or sellers, many of whom could not have been injured in their business or property or in any other way by defendants?

2. In this *in personam* action for money damages, do due process and Rule 23 require individual notice to the 2,250,000 class members "who can be identified through reasonable effort"?

3. May 90% of the cost of notice to such a "class" in such an action, in the amount of $19,530, be imposed upon defendants when such costs concededly will be unrecoverable if defendants prevail at trial on the merits?

4. May defendants be compelled to undergo a preliminary trial on the merits before the Court in a jury case in order to determine whether, on the basis of the probability of plaintiff's success on the merits, they will be compelled to finance a lawsuit against themselves?

5. Without distortion of substantive law, is this case manageable by any reasonable interpretation of Rule 23?

Statement of the Case

Plaintiff's claim upon the discretionary jurisdiction of this Court rests largely upon mischaracterizations of the nature and effect of the decisions below. A rather full statement of the case is necessary to reveal how far astray plaintiff has gone in his attempt to broaden the impact of this case beyond its own facts and the careful limitations of the Court of Appeals' decisions.

The Complaint

The complaint (1ra*) in this action, filed on May 2, 1966, alleges that the suit is a class action brought on behalf of all purchasers and sellers of odd-lots on defendant

* "ra" refers to respondents' supplemental appendix, which follows this brief.

New York Stock Exchange ("the Exchange"). This class was subsequently limited by the District Court to purchasers and sellers during the period May 1, 1962 through June 30, 1966. (52 F.R.D. at 261; 43-44a) Defendants Carlisle & Jacquelin and DeCoppet & Doremus, member firms of the Exchange, are alleged in the first two causes of action to have violated Sections 1 and 2 of the Sherman Act by fixing the odd-lot differential or commission. In the third cause of action, the Exchange is alleged to have violated Section 6 of the Securities Exchange Act of 1934 by failing adequately to regulate the odd-lot differential.

The complaint demands (1) treble damages from the odd-lot firms for plaintiff and his alleged class in an amount to be established at trial; (2) a "fund [for the payment of such damages] in an amount equal to treble that portion of the differential collected in the past which has been excessive"; (3) an unspecified amount of damages from the Exchange; (4) an injunction prohibiting any differential which is "excessive"; and (5) attorneys' fees.

Antecedent Decisions Below on the Class Action Question

Upon motion by defendants, the District Court (Tyler, J.) by decision dated September 27, 1966 (41 F.R.D. 147; 8ra) dismissed the action as a class action because (a) plaintiff had failed to demonstrate that he would be able fairly and adequately to protect the interests of the class; (b) the notice required by the Due Process Clause and Rule 23(c)(2), Federal Rules of Civil Procedure, could not be given; and (c) questions common to the class did not predominate over questions affecting individual members.

Plaintiff appealed from the District Court's decision and defendants moved to dismiss the appeal on the ground that the order appealed from was not final. The Court of Appeals (Waterman, Moore and Kaufman, Circuit Judges, per Kaufman, J.) by decision dated December 19, 1966, held that the denial of class action status was appealable as a final order under 28 U.S.C. §1291 because, in view of the small amount of the individual claim involved, it constituted the "death knell" of the action. 370 F.2d 119, *cert denied* 386 U.S. 1035 (1967); 1a.

The appeal was then heard on the propriety of the District Court's dismissal of the action as a class action. By opinion dated March 8, 1968, the Court of Appeals (Medina and Hays, Circuit Judges, per Medina, J.) reversed, articulated a number of principles in regard to facts then in the record, expressly retained jurisdiction, and remanded to the District Court for an evidentiary hearing to determine further facts consistent with the Court's opinion. 391 F.2d 555; 5a.

On the question of notice, the Court of Appeals said in its 1968 opinion:

> "Notice, as an integral part of due process must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'
>
> • • •
>
> "The task of furnishing notice to the class members *in such a case as this* must rest upon the representative party when he is the plaintiff." 391 F.2d 568; 24a. (italics added)
>
> • • •

"* * * we assume that some sort of ritualistic notice in small print on the back pages of a newspaper would in no event suffice." 391 F.2d at 569; 25a.

* * *

"* * * if the Court finds that a considerable number of members of the class can be identified with reasonable effort, and financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than dismissal of the class suit." 391 F.2d at 570; 27a

On the question of manageability, the Court of Appeals said:

"Bearing in mind the desirability of providing small claimants with a forum in which to seek redress for alleged large scale anti-trust violations, we are still reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them.

* * *

"If as a practical matter class members are not likely ever to share in an eventual judgment, we would probably not permit the class action to continue.

"* * * it is not inconceivable that the District Court on remand may conclude that these separate questions present insuperable problems of judicial administration sufficient to justify the dismissal of the action." 391 F.2d at 567; 21-22a (footnotes omitted).

In conclusion, the Court of Appeals stated:

"Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequate representation, effective administra-

tion of the action and any other matters which the District Court may consider pertinent and proper." 391 F.2d at 570; 28a.

Chief Judge Lumbard filed a dissenting opinion in which he catalogued the difficulties that would be inflicted upon the Court in managing the action as a class action and stated, among other things:

> "Even if plaintiff is unable to maintain an action, when a controversy touches the interest of so many members of the public it is sufficient that Congress has provided a public agency whose duty it is to supervise and regulate such matters. Comment, Recovery of Damages in Class Actions, 32 U. Chi. L. Rev. 768, 785 (1965). The matter of proper commissions to be paid by those who engage in odd-lots transactions is within the jurisdiction of the SEC. It has been the subject of study and in due time the Commission will take appropriate action.
>
> "The appropriate action for this court is to affirm the district court and put an end to this Frankenstein monster posing as a class action." 391 F.2d at 572; 31a.

After submission of lengthy stipulations and a short hearing, by opinion and order dated April 7, 1971 (52 F.R.D. 253; 32a), the District Court made extensive findings of fact (33-39a) pursuant to the remand instructions of the Court of Appeals. In summary, the District Court found that there were 6,000,000 members of the class; 2,250,000 of these could be identified through reasonable effort and the remainder could not. Class members resided throughout the United States and most foreign countries. During the period for which the class was defined (1962-1966), the average odd-lot differential per transaction was

approximately $5.18 and the average buyer or seller had approximately 5 transactions. The cost of distribution of a settlement fund in a similar case, *Cherner* v. *Transitron Electronic Corporation,* 201 F.Supp. 934 (D.Mass. 1962), amounted to $25.47 per person excluding attorneys' fees, and $33.80 per person including attorneys' fees.

Upon such findings, the District Court went on to hold, directly contrary to its initial decision, that the action could be maintained as a class action. To do this, the Court adopted the novel theory of a "fluid class recovery" to benefit future odd-lot purchasers and sellers through an adjustment of the odd-lot differential *in futuro.* This concept, the District Court held, would mean that gross damages can "be fairly estimated without having individual claims filed by each class member." 52 F.R.D. at 262; 44a. With respect to payment of any possible damages, the Court held:

> "Distribution of an eventual recovery to the class members in a case such as this one need not be viewed solely in terms of personal and individual damages and recoupment thereof. * * * I think it appropriate, as plaintiff urges, to consider some kind of 'fluid class recovery', i.e. to consider distribution of damages to the class as a whole rather than to adopt, at this initial, planning stage, an inflexible mold of recovery running to specific class members. To emphasize individual recovery is to unduly stress considerations not wholly relevant to the conditions of this case * * *." 52 F.R.D. at 264; 49a.

The Court found "that a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable

by the court until such time as the fund is depleted." 52 F.R.D. at 265; 50a.

Despite finding that 2,250,000 of the class members can be identified by running computer tapes (Findings of Fact 5, 9, 10; 52 F.R.D. at 257-258; 34-37a), the District Court outlined a notice program in which individual notice would be sent only to 2,000 class members who had 10 or more odd-lot transactions plus 5,000 additional class members selected at random, and a ¼ page notice would be published once in each of four newspapers (52 F.R.D. at 267-268; 54-58a). Thus, less than ½ of 1% of the readily identifiable class members would receive individual notice.

Since plaintiff had stated from the outset that he could not pay the expense of individual notice, the District Court decided to hold a preliminary hearing on the merits to serve as a basis for allocation of the expenses of the nominal notice that the Court thought sufficient. 52 F.R.D. at 269-272; 58-64a. The preliminary hearing (or so-called "mini-hearing") was then held over defendants' strenuous objection. Both sides submitted documentary evidence and briefs. No witnesses were called. Plaintiff concluded his argument with a plea that he could not pay any more than nominal notice costs.

The District Court subsequently issued a further opinion (54 F.R.D. 565; 72a) concluding that the odd-lot defendants had fixed the differential in 1951, which was a *per se* violation of the antitrust laws—with no consideration given to the reasonableness of the circumstances, or of the differential, or to the fact that, as its minutes showed (Ex. J at the preliminary hearing), the S.E.C. had advised the parties before the 1951 differential was changed

that it had no objection to the new rate—and that the Exchange was an active participant through its failure to regulate. The District Court then found that plaintiff was more likely to prevail at trial on the merits and ordered defendants to pay 90% ($19,530) of the notice cost.

The Record on the Issues of Liability and Damages

The District Court based its substantive conclusions on the fact that the Exchange regulated the odd-lot differential through settled practice rather than formal rule. The District Court completely ignored the regulatory context in which the differential was determined, including S.E.C. supervision and hearings (54 F.R.D. at 572; 83a).

Defendants had contended at the mini-hearing that under this Court's decision in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), and its progeny, and *Baird* v. *Franklin,* 141 F.2d 238 (2d Cir.), *cert. denied,* 323 U.S. 737 (1944), the following uncontroverted facts placed in the record by defendants showed plaintiff's claims to be without merit:

> (1) Sections 19(b)(9) and (11) of the Securities Exchange Act, 15 U.S.C. §§78s(b)(9) and (11), 7ra, give the S.E.C. power to order changes in rules *and practices* of the Exchange particularly in respect to the fixing of reasonable rates of commission, interest, other charges and odd-lot purchases and sales, when necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange.
>
> (2) The S.E.C. has concurred that practices are co-equal with rules for purposes of Section 19(b). *In re the Rules of the New York Stock Exchange,* 10 S.E.C. 270, at 293 (1941).

(3) Historically it had been the practice for the odd-lot differential to be set by the odd-lot firms with the concurrence of the Exchange and the S.E.C., and such practice was left undisturbed by the S.E.C. after lengthy consideration of the Exchange's rules and practices respecting odd-lot trading, including the differential, in the light of, among other things, antitrust considerations. *In re the Rules of the New York Stock Exchange,* 10 S.E.C. 270, 284, 287-288 (1941).

(4) Between 1950 and 1964 the Exchange had each year advised the S.E.C. that "transactions in odd-lots are effected on this exchange under methods which have been prescribed by the odd-lot brokers and dealers with the acquiescence of the Exchange" (Ex. E at the preliminary hearing).

(5) The 1951 increase in the differential here alleged to be a violation of the antitrust laws and the Exchange Act was, with the approval of the Exchange, presented to the S.E.C. by the odd-lot defendants and elicited S.E.C. approval, as shown by the following minutes of the S.E.C.:

> "After due consideration, the Commission took the position, and so advised Mr. Hanrahan [attorney for the odd-lot defendants], that * * * the Commission had no objection to the present proposal for an increase in the odd-lot differential and would take no action, if the firms of Carlisle & Jacquelin and DeCoppett & Doremus should proceed with such increase." (Ex. J. at preliminary hearing).

(6) The question of the 1951 increase in the differential was thereafter presented to the S.E.C. again by the Midwest Stock Exchange and approved after a two-day hearing (Ex. Q, Ex. 1, p. 183; Ex. 7, pp. 41-44 at the preliminary hearing).

(7) Formal adoption of the increase by the Exchange was reported to the S.E.C. by the Exchange's

letter of August 17, 1951 (Ex. K at the preliminary hearing).

(8) In April, 1964 the Exchange enacted a formal rule establishing the differential to be the one in effect at the time and in 1966 the Exchange amended that rule at the request of the S.E.C. made pursuant to Section 19(b) of the Exchange Act to raise the breakpoint to $55* (Ex. C. at the preliminary hearing).

(9) A cost study undertaken by Price Waterhouse (Ex. A at the preliminary hearing) at the direction of the Exchange and the S.E.C. was completed on June 14, 1966 and found the past profits of the odd-lot defendants to have been reasonable in comparison to similar businesses.

(10) In 1969, the Justice Department approved the merger of the two odd-lot firms, principally on the ground that the odd-lot business was unique and required a unitary system of operation (letter of Richard W. McLaren, September 17, 1969; Ex. D at the preliminary hearing).

Thus, despite clear statutory power over the differential, the S.E.C. ordered no change until 1966—apparently satisfied that the differential it had approved in 1951 was appropriate for that 15-year period.

Defendants also contended that even if there were liability, there could be no provable damages. The damage estimates of the District Court were based not upon any evidence but upon the assumption that because there was in 1966 a reduction in the odd-lot differential to reflect

* As publicly announced, effective July 7, 1972, due to economies recently effected in the manner of handling odd-lot orders, the differential was reduced by amendment of Exchange rule after the prior required notification to the S.E.C. so that all odd-lot trades are presently effected at a uniform ⅛ point. Of course, this change does not benefit the "class" of purchasers and sellers during 1962-1966 which plaintiff claims to represent.

economies, the differential during the 1962-66 period would have been, absent the allegedly illegal rate-fixing, the differential after the 1966 reduction. 52 F.R.D. at 265; 51a. Defendants had argued that the record showed that if the differential had not been established by practice, it would have been set by rule of the Exchange (as it was in 1964) or by the S.E.C. exactly at the point at which it was set by the alleged conspirators because both regulatory agencies had determined such level to be reasonable.

The Jurisdictional Basis for the Decision Below

Thereafter, defendants moved the Court of Appeals to take up the matter again pursuant to the jurisdiction which that Court had retained in its 1968 decision. By order dated May 1, 1972, the Court (Medina, Lumbard and Hays, Circuit Judges) granted the motion (88a). Prior thereto, and because plaintiff had attacked the jurisdiction retained by the Court in its 1968 decision, defendants filed a notice of appeal. Plaintiff's motion to dismiss the appeal was denied by the Court's order of June 29, 1972* (91a).

---

* Plaintiff's attack on the jurisdiction of the Court of Appeals is unfounded. The mandate in relevant part read, "remanded to said District Court for the proceedings in accordance with the opinion of this court * * *". That opinion expressly retained jurisdiction. Plaintiff's citations are inapposite. In *In re Nevada-Utah M & S Corp.*, 204 Fed. 982 (2d Cir. 1913), there was no retention of jurisdiction. The Court denied rehearing after issuance of the mandate but indicated that it had power to require return of the mandate. In *Meredith* v. *Fair*, 306 F.2d 374 (5th Cir. 1962), the Court did not reserve jurisdiction, held that its mandate could not be stayed after issuance, but recalled the mandate to correct a proceeding that it adjudged inconsistent with the intent of its decision. Furthermore, the decision of the District Court herein ordering defendants to pay $19,530, which will never be recovered, constitutes a perfect example of a final order appealable under the collateral order doctrine, 28 U.S.C. §1291; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964).

The Decision Below

After receiving briefs and hearing oral argument, the Court of Appeals by decision dated May 1, 1973 (92a) (Medina, Lumbard and Hays, Circuit Judges), vacated the findings and conclusions of the District Court on the mini-hearing, reversed the District Court's ruling permitting the action to be prosecuted as a class action, and dismissed the action as a class action without prejudice to the continuance of the action by plaintiff individually. Judge Medina, joined by Judge Lumbard, filed an opinion (92a) based on the principles set forth in the Court's 1968 decision and well-established precedents of both this Court and other Courts of Appeal. The opinion held that:

1. Rule 23 is a procedural device to facilitate judicial disposition of the individual claims of separate members of a class of persons so numerous that joinder of all members is impractical; the rule was not intended to affect substantive rights, nor could it under the Enabling Act.

2. Rule 23 cannot alter the principles of substantive law to make permissible a "fluid class recovery" for claims under Section 4 of the Clayton Act and Section 6 of the Exchange Act.

3. In an *in personam* action for money damages, *"such * * * as this"*, Rule 23(c)(2) and due process require "individual notice to all members who can be identified through reasonable effort."

4. In a purely adversarial situation *"such * * * as this"*, the plaintiff must pay the expense of giving notice to the members of the class.

5. The mini-hearing on the merits was not authorized by Rule 23 or any other rule, statute or principle and violated defendants' constitutional safeguards.

6. The evidence on remand as to plaintiff's unwillingness to pay for notice, the diversity and dispersion of the class, and the difficulty of processing and distributing any recovery, as compared with the costs of administration, showed the action to be unmanageable as a class action, as had been feared by the majority and contended by Chief Judge Lumbard in the Court's 1968 opinions.

Judge Hays filed a separate memorandum (120a) concurring in the result because he could not accept the District Court's requiring defendants to pay 90% of the cost of notice ($19,530) which could never be recovered if defendants prevailed at trial on the merits.

Reasons for Denying the Writ

I. The decision below rests on the peculiar facts of this case and upon undisputed principles of law articulated by this and other appellate courts.

The decision of the Court of Appeals did decide issues important to this case. The Court decided those issues on the peculiar facts of this case and upon undisputed principles of law. There is no conflict with any decision of this Court or of any Court of Appeals. Indeed, the decision below fits without difficulty into the developing jurisprudence in the field. See *Grad* v. *Memorex Corp.*, CCH Fed. Sec.L.Rep. ¶94,029 (N.D. Cal. June 19, 1973). Therefore, this case does not merit consideration by this Court.

A. Rule 23 is a procedural device that cannot alter substantive rights.

The Court of Appeals' rationale, correctly, began with the proposition that it was construing a procedural rule designed to achieve economy and uniformity of decision, and a rule which could not change the substantive law,

enlarge existing remedies, or sweep away established procedural safeguards (107a).

This Court promulgated Rule 23 pursuant to the Rules Enabling Act. That Act provides that:

> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right to trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." 28 U.S.C. §2072; 17ra.

If the Rule were construed to permit alteration of substantive rights, the Rule as so applied would be invalid under the Enabling Act. *Snyder* v. *Harris,* 394 U.S. 332 (1969); *Sibbach* v. *Wilson and Company,* 312 U.S. 1 (1940).

From the face of Rule 23(b)(3), it is clear that the Rule is a procedural device for bringing together in one forum existing claims of actual individual plaintiffs to achieve economies and uniformity of decision where that can be done without sacrificing procedural fairness or bringing about other undesirable results. See also Advisory Committee Note, 39 F.R.D. 98, 102-104; 18, 26-28ra. Professor Benjamin Kaplan, who at the time of the 1966 amendment of the Rule was the Reporter to the Advisory Committee and subsequently became a member of the Committee, has written:

> "The object [of Rule 23(b)(3)] is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure* (I), 81 Harv. L.Rev. 356, 390 (1967).

B. The substantive law does not authorize a "fluid" or any other recovery for "the class as a whole" or for persons not injured.

The "fluid class recovery" for the "class as a whole", including many persons who could not have been damaged, is directly contrary to a decision of this Court on Rule 23, contrary to Section 4 of the Clayton Act, and contrary to all existing precedent in respect to Section 6 of the Exchange Act.

This Court has decided that the alleged claims of many absent individuals may not be treated collectively as "the class as a whole", and that the 1966 amendment to Rule 23 could not and did not effect a change in a federal statute. *Snyder* v. *Harris, supra.*

The complaint seeks treble damages under Section 4 of the Clayton Act (15 U.S.C. §15; 149a). That statute provides in relevant part that "Any person who shall be injured in his business or property * * * shall recover threefold the damages *by him* sustained * * *" (italics added). No remedy is provided by which past wrongs can be righted by future rate adjustments or by payments of money damages to persons not injured in their business or property.

"[P]enalties which are not authorized by law may not be inflicted by judicial authority * * *", *Standard Oil Company of New Jersey* v. *United States,* 221 U.S. 1, 77 (1911). See also *Geddes* v. *Anaconda Copper Mining Company,* 254 U.S. 590, 593 (1921).

The word "damages" in Section 4 of the Clayton Act has never been construed to mean anything other than money damages for those who prove they were injured in

their business or property. Reduction of the odd-lot differential in the future will not compensate those who no longer trade; it is sure to benefit many who could not possibly claim any injury (those trading in the future but not during 1962-1966). Had Congress intended to permit the extraordinary recovery in antitrust actions which plaintiff proposed, it would have so provided. See *State of Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), in which this Court observed:

> "In enacting these [antitrust] laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their *actual* damages every time they were injured in their business or property by an antitrust violation." (at 262; emphasis added)
>
> • • •
>
> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." (Note, at 263)

The Court of Appeals for the Third Circuit, in *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (June 19, 1972), in rejecting the "death knell" theory of finality for purposes of appeal from denial of class action status, also rejected the argument that "• • • the revised Rule 23 may be seen as an extension by the Supreme Court, acquiesced in by Congress, of the deterrent policies of such statutes as §4 of the Clayton Act". The Court said:

"The decision in Snyder v. Harris, *supra,* would seem to indicate that the Court had a much more limited goal in mind when it promulgated the revised Rule 23. Allowing the aggregation of claims would have been more consistent with such an intention." (Note 7; at 623)

As Judge Medina pointed out, the *Drug* cases (*State of West Virginia* v. *Chas. Pfizer & Co.*), 440 F.2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.,* 404 U.S. 871 (1971), which dealt with voluntary settlements of class actions, are not precedent for a "fluid class recovery" in a litigated case such as this. 103-104a.

The complaint also seeks to recover damages against the Exchange under Section 6 of the Exchange Act. That Act does not authorize a private damage suit for violation of Section 6. This Court has not spoken to that issue. The leading case of *Baird* v. *Franklin,* 141 F.2d 238 (2d Cir.), *cert. denied,* 323 U.S. 737 (1944), has articulated the principles for recovery of damages through a judicially implied private right of action based on Section 6. It is clear from both the majority opinion in *Baird* v. *Franklin* and Judge Clark's dissenting opinion that recovery must be compensatory and, under the common law principles which the Court applied, is obtainable only upon proof of injury proximately caused by the statutory violation.

"It is well established that members of a class for whose protection a statutory duty is created may sue for injuries resulting from its breach and that the common law will supply a remedy if the statute gives none."

* * *

"Granted a right of action in plaintiffs, then, the final question is as to damages and whether the Ex-

> change's breach of duty was a proximate cause of plaintiffs' losses." at 245.

The principles of the *Baird* decision have been followed in all succeeding decisions on Section 6 liability. See, *e.g., Butterman* v. *Walston & Co.*, 387 F.2d 822 (7th Cir. 1967), *cert. denied*, 391 U.S. 913 (1969); *Pettit* v. *American Stock Exchange*, 217 F.Supp. 21 (S.D.N.Y. 1963).

Furthermore, the Exchange Act vests in the Securities and Exchange Commission regulatory authority over the odd-lot differential (§§19(b)(9) and (11), 15 U.S.C. §§78(s)(b)(9), (11); 7ra). The District Court may not intrude by itself fixing the differential. See *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952).

C. Both Rule 23 and due process require "individual notice to all members who can be identified through reasonable effort".

The Court below held that in this *in personam* suit for money damages, individual notice was required for the 2,250,000 class members whose names and addresses were readily available.

This Court held in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-320 (1950), that due process requires individual notice to those whose property rights are to be adjudicated and whose names and addresses are known.

In *Schroeder* v. *City of New York*, 371 U.S. 208 (1962), this Court said:

> "• • • notice by publication is not enough with respect to a person whose name and address are known or very

easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." at 212-213

Thus, Rule 23(c)(2) reflects the decisions of this Court by requiring individual notice to all members who can be identified through reasonable effort.* The Advisory Committee's Note indicates that such notice is mandatory and not discretionary. 39 F.R.D. at 105-107; 55-56ra.

Plaintiff argues that this action can be considered a Rule 23(b)(2) action to avoid the notice requirements of Rule 23(c)(2). In its 1968 decision, the Court of Appeals correctly held this not to be an action predominantly or exclusively brought for injunctive or declaratory relief and therefore not within Rule 23(b)(2). See Advisory Committee's Note, 39 F.R.D. at 102; 24ra. Money damages are what this suit is all about. The Court of Appeals did not rule in its 1968 decision, as plaintiff suggests, that a (b)(1) or (b)(2) action was subject to the individual notice requirements of Rule 23(c)(2). 391 F.2d at 564-565; 17a. The Court merely held that some form of notice was required by due process in (b)(1) and (b)(2) actions. There is, therefore, no conflict with the decision in *Hammond* v. *Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972), which said only that "The notice requirement of Rule 23(c)(2) does not apply" to Rule 23(b)(2). The Court below agrees.

Plaintiff relies on the Third Circuit's affirmance of *Katz* v. *Carte Blanche Corporation*, which is set forth in his Appendix (136a). The District Court's decision there, 53

* The *Drug* cases, *supra*, are not to the contrary, as the Court below held. See N17, 109-110a.

F.R.D. 539 (W.D. Pa. 1971), *aff'd*, —— F.2d —— (3rd Cir. 1973), is entirely consistent with the decision of the Court below since it held that individual notice to 800,000 members of the class of Carte Blanche credit card holders was required by due process and Rule 23(c)(2):

> "One of the basic rationales underlying the class action mechanism is that it will afford large numbers of claimants with similar but individually small claims access to the courts. Nevertheless the rule itself provides, indeed requires, individual notice when the individual members of the class are identifiable through reasonable effort." 53 F.R.D. at 545.

There is no conflict with this Court's decision in *Hansberry* v. *Lee*, 311 U.S. 32 (1940), which dealt only with the question of adequacy of representation and not with notice.

Plaintiff suggests in the statement of his Second Question (Pet. 3) that it is unnecessary to give the individual notice required by Rule 23 and due process because the statute of limitations has run. The suggestion ignores considerable authority indicating that the pendency of a class action tolls the statute of limitations. See *State of Utah* v. *American Pipe & Construction Co.*, 473 F.2d 580 (9th Cir. 1972), *cert. granted*, —— U.S. —— (1973); *Lamb* v. *United Security Life Company*, 1971-72 Fed. Sec. L. Rep. ¶93, 489 (S.D. Iowa 1972) (cited by plaintiff at Pet. 27); *McCausland* v. *Shareholders Management Co.*, 52 F.R.D. 521 (S.D.N.Y. 1971). Furthermore, many alleged class members may wish to assist in determining the course of the action, and others may prefer to opt out to avoid discovery, the possibility of assessment of costs, or simply because they are not litigious. These members are entitled to such options, and Rule 23 provides them through the requirement of notice.

D. "In such a case as this", it is clear that plaintiff must bear the burden of notice.

Plaintiff argues that the decision below requires a plaintiff in all Rule 23(b)(3) actions to pay for the cost of notice. The lower Court's decision is far narrower.

In its 1968 decision, the Court of Appeals ruled that "in such a case as this" the task of furnishing notice must rest upon the representative party when he is the plaintiff. 391 F.2d at 568; 24a. In the decision below, the Court reiterated the limited nature of this holding (alternatively using the language " 'in this type of case' "; 97a), pointing out that this is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Exchange Act and not a shareholder's action (such as those cited by plaintiff at Pet. 16; 26-27) or a case against a public utility sending monthly bills to its customers. N 5 at 97-98a. In such cases, the cost of notice question is to be decided on the particular facts before the court.

The District Court's order would have resulted in a clear taking of defendants' property in substantial value* with the assurance that it would *not* be returned should defendants be successful at trial. This alone was sufficient reason for Judge Hays to vote for reversal. Such a taking would violate defendants' right to trial by jury under the Seventh Amendment (36ra), see *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364 (1913), and to due process under the Fifth Amendment (146a). The cases cited by plaintiff as authority for such a taking deal only with a temporary taking in connection with a provisional remedy, with assurances for return. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

* The $19,530 assessment upon defendants is almost twice the jurisdictional amount required by 28 U.S.C. §§1331 and 1332.

E. The Court of Appeals' disapproval of the preliminary hearing was in accord with the Federal Rules, followed the decision of the Fifth Circuit and was necessary to preserve defendants' rights.

Rule 23 does not authorize a preliminary hearing on the merits to determine who is to pay for notice. Such a hearing subverts Rule 23's direction for prompt class action determination and subverts the procedures prescribed by other Federal rules, such as Rules 12 and 56, and the discovery rules. It also subverts defendants' right to trial by jury under the Seventh Amendment (36ra).

The decision below followed the decision of the Fifth Circuit in *Miller* v. *Mackey International, Inc.*, 452 F.2d 424 (5th Cir. 1971). No other Court of Appeals decision is in conflict. See *Johnson* v. *Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969); *Kahan* v. *Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); *Halverson* v. *Convenient Food Mart, Inc.*, 458 F.2d 927, 932 (7th Cir. 1972). In *Miller*, Judge Wisdom held that the mere possibility that the District Court may have considered the merits on a Rule 23 determination was sufficient reason for reversal:

> "This portion of the order indicates to us that in passing on the propriety of the class action the district judge may have considered whether the petition stated a cause of action or whether Miller would succeed on the merits. This was improper. In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.
>
> "The determination whether there is a proper class does not depend on the existence of a cause of action. A suit may be a proper class action, conforming to

Rule 23, and still be dismissed for failure to state a cause of action.

* * *

"* * * The Advisory Committee Notes make clear that a district judge is to consider only the specific requirements of sub-divisions (a) and (b) of Rule 23. The Committee stated with respect to sub-division (c) (1) of Rule 23:

> " 'In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. *The determination depends in each case on satisfaction of the terms of sub-division (a) and the relevant provisions of sub-division (b).*' " 452 F.2d at 427-428.

See also *Lamb* v. *United Security Life Company, supra,* (also cited by plaintiff at Pet. 27) refusing a preliminary hearing and discussing (at pp. 92, 370 - 92, 372) the problems and lack of safeguards inherent in such a hearing.

F. The peculiar facts of this case amply support the lower Court's decision that this case is unmanageable as a class action.

Plaintiff conceded that this case was unmanageable absent the significant changes in substantive law required for a "fluid class recovery" (114a). The evidence amply supports the finding of unmanageability. This Court does "not grant certiorari to review evidence and to discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925). Such review by this Court in this case would be particularly inappropriate since dismissal of the action as a class action is consistent with the weight of relevant authority. See decision below, N 20, at 113a.

II. Plaintiff's petition seeks relief that can be granted only by Congress.

The Court below recognized that plaintiff asserts a legitimate social interest in finding a forum through which compensation can be available for millions of consumers asserting small claims under the antitrust, securities and other laws (118a). The Court also recognized that it was beyond the power of the federal courts to create that forum by interpretation of Rule 23 to effect substantive changes in the law.

> "From our extensive study of the whole situation in working on this *Eisen* case it would seem that amended Rule 23 provides an excellent and workable procedure in cases where the number of members of the class is not too large. It seems doubtful that further amendments to Rule 23 can be expected to be effective where there are millions of members of the class, without some infringement of constitutional requirements. The problem is really one for solution by the Congress." at 118a.

It is the legislature's function to strike a balance between the need to redress relatively small grievances and the plain fact that "courthouses are not coliseums," *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, 297-98 (2d Cir. 1969). Determination of policy concerning consumer class actions in federal courts should occur in the Congress.* This Court has so held:

> "There is no compelling reason for this Court to overturn a settled interpretation of an important con-

* The Senate Commerce Committee is presently studying the question of consumer class actions.

gressional statute in order to add to the burdens of an already overloaded federal court system. Nor can we overlook the fact that the Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand or contract the jurisdiction of federal courts. If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the Courts." *Snyder* v. *Harris, supra,* at 341-342.

Plaintiff's quotation of dicta from cases such as *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964) and *Hanover Shoe Co.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968), is inapposite. Those cases did not involve an attempt to obtain substantive change through interpretation of procedural rule. Those opinions, furthermore, were written after trial on the merits with all the attendant procedural safeguards.

III. Even if the Court wishes to consider the Rule 23 issues raised below, this is not the case in which to do so.

The evidence shows that the "class" in this case is not the individuals seeking to prosecute existing claims whom Rule 23 was designed to assist. There is, in short, no real class here. There are plaintiff, and his lawyers, who have litigated this case for seven years with great attendant publicity but no intervention by any other party.

Since there are no individuals seeking to press claims for money damages, there is no social objective for continuation of this case as a class action. The rate against which

the prayer for injunctive relief is directed in the complaint has changed thrice, twice under the auspices of the Securities and Exchange Commission, the last time approximately one year ago. The alleged conspirators have been, with the approval of the Justice Department, permitted to merge and now are conducting the odd-lot business as the only odd-lot firm on the Exchange. Surely, the facts of this case do not cry out for the attention of this Court.

Moreover, the lower Court's decision permits plaintiff to continue to prosecute this action on his own behalf. There is sufficient incentive for him, and his lawyers, to do so. Plaintiff has the incentive of treble damages. Section 4 of the Clayton Act also permits recovery of a "reasonable attorneys' fee" by a successful antitrust plaintiff, and this fee is not limited to a portion of the damages recovered but is to be computed on the basis of the worth of the services. See e.g. *Courtesy Chevrolet* v. *Tennessee Walking Horse Breeders,* 393 F.2d 75 (9th Cir. 1968), *cert. denied* 393 U.S. 938 (1968) (damages of $3,400; attorneys' fees of $10,000); *Advance Business Systems and Supply Co.* v. *SCM Corporation,* 284 F.Supp. 143 (D.Md. 1968), *aff'd* 415 F.2d 55 (4th Cir. 1969), *cert. denied* 397 U.S. 920 (1970) (damages of $16,714; attorneys' fees of $35,875); *Vandervelde* v. *Put and Call Brokers and Dealers Assn.,* 344 F. Supp. 118 (S.D.N.Y. 1972) (damages of $6,870; attorneys' fees of $55,000); *Finley* v. *Music Corp. of America,* 66 F. Supp. 569 (S.D. Cal. 1946) (no damages; attorneys' fees of over $9,000); *Union Leader Corp.* v. *Newspapers of New England, Inc.,* 218 F.Supp. 490 (D. Mass. 1963), *reversed on other grounds,* 333 F.2d 798 (1st Cir.), *cert. denied,* 379 U.S. 931 (1964) (damages of under $30,000; attorneys' fees

of $68,000). The District Court (Wyzanski, J.) in the latter case said:

> "Allowing a reasonable attorney's fee in excess of the losses sustained by the plaintiff is proper whenever those losses could not otherwise have been recovered." (at 492)

See also *Montague & Co.* v. *Lowry,* 193 U.S. 38, 48 (1904); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.,* 346 F. 2d 661 (6th Cir.), *cert. denied,* 382 U.S. 904 (1965); *Darden* v. *Besser,* 257 F.2d 285 (6th Cir. 1958). These cases and this principle were not considered by the Court of Appeals when it rendered its 1966 "death knell" decision. 370 F.2d 119 (2d Cir. 1966), *cert. denied* 386 U.S. 1035 (1967); 1a.

If plaintiff is unwilling to continue his individual action, the observation of Court of Appeals for the Third Circuit is appropriate:

> "If the public interest issue involved in the individual suit is so insignificant that neither a private nor a public attorney deems it worthy of pursuit, despite the availability of an award of attorneys' fees in the event of success, then the public interest issue may well be so insignificant that the redress of the nine-dollar wrong should from a policy viewpoint be left to the realm of private ordering. Our scarce federal judicial resources cannot be allocated on the vindication of every individual wrong however slight. • • • If in some cases as Judge Rosenn suggests the individual claim often will be so small that neither private nor public lawyers think it should be litigated, then that decision of the legal marketplace may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere." *Hackett* v. *General Host Corp., supra,* at 625-626.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied. The case should not be remanded to the Court of Appeals for *in banc* consideration because such consideration has already been denied by that Court.*

Respectfully submitted,

DEVEREUX MILBURN
2 Wall Street
New York, New York 10005
Attorney for Respondents
Carlisle & Jacquelin and
DeCoppet & Doremus

WILLIAM ELDRED JACKSON
RUSSELL E. BROOKS
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for Respondent
New York Stock Exchange, Inc.

Of Counsel:
CARTER, LEDYARD & MILBURN
MILBANK, TWEED, HADLEY & MCCLOY

August 29, 1973

---

* *United States ex rel. Robinson* v. *Johnson*, 316 U.S. 649 (1942), cited by plaintiff (N18 Pet. 29), is not authority for this Court's remanding this case to the Court of Appeals for *in banc* consideration. In *Robinson*, a petition for rehearing had never been filed with the Court of Appeals. This Court remanded with leave to apply for rehearing *in banc*. Here, that petition has been made and has been denied. This Court lacks jurisdiction to direct rehearing, and the Court of Appeals lacks jurisdiction to reverse itself at this late date. See 28 U.S.C. §46(c); Rules 35 and 40, Federal Rules of Appellate Procedure.